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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 510.

HERMAN KRAVITZ, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Herman Kravitz, your petitioner, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on August 12, 1960.

OPINION BELOW

The opinion of the court below (*infra* Appendix A, pp. 1a-16a) has not yet been reported.

JURISDICTION

The judgments of the court below (*infra*, Appendix B, pp. 16a-18a) were entered on August 12, 1960. A timely petition for rehearing was denied (*infra*, Appendix C, p. 19a) on September 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The FIFTH AMENDMENT provides, *inter alia*, that —No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *

2. The SIXTH AMENDMENT provides, *inter alia*, that —In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

3. TITLE 18, UNITED STATES CODE:

§ 2. *Principals*

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offe[illegible] against the United States, is also a principal and punishable as such.

4. TITLE 18, UNITED STATES CODE:

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

5. INTERNAL REVENUE CODE OF 1939:

§ 145. *Penalties*

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., § 145.)

QUESTIONS PRESENTED

1. Whether the prosecutor's statement in his argument to the jury that the offense of tax evasion is "in a real sense, treason" constituted incurable prejudicial error.

2. Where a witness for the prosecution is a thrice convicted felon, an inmate of a federal prison, a severed co-defendant in the indictments being tried, the designer and beneficiary of the tax evasion scheme underlying the prosecution; where it has been proven that the witness gave false testimony on the stand; and where the witness is in a position to benefit financially in his own federal tax difficulties and also to win discharge of criminal indictments pending against him by incriminating the other defendants, and there are still other reasons to doubt his credibility, was it prejudicial error for the trial judge to throw the weight and prestige of his office into the equation by charging the jury that he believes the witness told the truth and that he does not believe the petitioner told the truth?

3. Where a vital issue at the trial is the credibility of a prosecution witness and the defense has challenged his credibility on numerous grounds, was it prejudicial error for the trial judge to single out only one of those grounds in his charge to the jury and ask them whether that is sufficient reason to disbelieve the witness, thereby effectively removing from the equation all the other grounds presented by the defense?

4. Whether it was prejudicial error for the trial judge to read to the jury portions of the direct testimony of a witness harmful to petitioner without also

reading to the jury the relevant cross-examination wherein it was shown that the same witness, five years earlier, in a sworn statement given to agents of the Internal Revenue Service, had recounted the circumstances in detail without ever mentioning that petitioner had any part in them.

5. Where the defense has suggested that the Government may have inconsistently prosecuted two persons for having received identical funds, was it prejudicial error for the trial judge to refuse to postpone the trial and to examine the Grand Jury testimony of Government witnesses even in connection with petitioner's post-trial motions, when such testimony was made available to him after the verdict, to ascertain whether the Government had in fact mounted inconsistent prosecutions?

6. Whether it was improper for a trial judge to impose an unprecedentedly harsh sentence upon a defendant because the defendant chose to stand trial rather than be convicted and sentenced upon a guilty plea.

7. Whether it was improper for the prosecutor to mislead the jury and petitioner with respect to matters concerning the veracity and motives of one of the prosecution's principal witnesses against petitioner.

STATEMENT

This is a criminal proceeding for income tax evasion under § 145(b) of the Internal Revenue Code of 1939 and for conspiracy to evade taxes in violation of 18 U.S.C. § 371. During the year 1951, Kravin Park Clothes, a clothing manufacturing company, reduced

its reported taxable income by falsely stating that certain large sums of money had been paid out to subcontractors. Petitioner and his father owned all the stock of Kravin Park Clothes. One Joseph Abrams acted as accountant and tax adviser to the firm. Following a complicated financial scheme devised by Abrams, most of the funds diverted from Kravin Park were eventually converted into bearer bonds.

A. Events Before and After the Trial

Several criminal charges followed from this diversion of funds. This particular proceeding arose in New Jersey. There petitioner, his father and Abrams were indicted in March 1958 for wilfully understating the corporation's net income and for conspiracy to evade corporate income and excess profits taxes for 1951. At the same time, both petitioner and his father were separately charged with understatement of their personal income for the same year, on the theory that they had received some of the diverted funds.

Abrams was indicted in New Jersey only for his complicity in the Kravin Park Clothes income tax offenses. Subsequently, in July 1958, in New York, he was charged with wilful understatement of his personal income taxes for the years 1951 and 1952 as well as for evasion of corporate income taxes by two New York corporations which he controlled.

In the grand jury proceedings leading to the latter indictment, petitioner appeared voluntarily as a witness for the Government. This appearance was made by petitioner on advice of counsel that, if he testified concerning Abrams and was of assistance to the Government in the prosecution of Abrams, the indictment

against petitioner's father in New Jersey would be "nolle prossed" and petitioner himself would be in a favorable position to receive a suspended sentence. (24a).* Thereupon, petitioner, who had previously entered a plea of not guilty to all charges, moved on July 3, 1958, to change his plea to guilty. The Government requested the court not to sentence petitioner until the case against Abrams had been completed in New York.[1]

More than a year later, in November 1959, Abrams pleaded guilty to one count in each of the indictments pending in New York. At that time he was already in prison, serving a two and one-half year sentence imposed for embezzlement of United States Government property. For the charge involving his 1952 personal income, Abrams was fined and received a two year sentence, to run concurrently with the embezzlement sentence he was then serving. On the 1951 tax indictment, he was fined and sentenced to one year in prison, but execution was suspended and he was placed on probation following release from prison; a condition of that probation was that he pay the

* References are to pages in Appellants' Appendix and Additional Appendix filed in the Court of Appeals, nine copies of which have been filed in this Court.

[1] There is not the slightest explanation for the delay in trying the New Jersey indictments against Abrams. The prosecutor had stated that the Government was ready to move for trial 10 days after the arraignment (32a), but the charges against Abrams were allowed to lie fallow until they were dismissed in April of 1960. (772a-775a).

One can hardly escape the conclusion that when Abrams learned that petitioner testified against him before the New York grand jury within a day or two afterwards (305a), and Abrams admittedly became actually concerned (307a), steps were taken to prevent Abrams from coming to immediate trial in New Jersey.

outstanding tax obligation on his 1951 personal income. The net effect of these sentences on the tax evasion convictions was to dispose of the pending charges against Abrams without any imprisonment other than that already imposed for embezzlement.

Abrams testified in the instant case that all of this was according to a prearrangement. Before he entered his two guilty pleas, he knew that the other New York charges were going to be "nolle prossed." (31a). In addition, he knew that the "deal" covered the New Jersey indictments, although there was to be no "nolle pros" there until after the trial of petitioner and his father. (304a). He had been told that the Justice Department had agreed to go along. (304). In fact the Department wrote to the United States Attorney in New Jersey on November 20, 1959, authorizing dismissal of the indictments against Abrams for the reason that he was already in prison, albeit on a completely unrelated offense. But petitioner did not learn of this until after the decision of this case by the Court below.

Meanwhile, counsel for petitioner, albeit unaware of the arrangement between Abrams and the Government, became apprehensive.[2] On October 9, 1959, a motion was filed on behalf of petitioner to withdraw the guilty plea which had been entered in July 1958 and to reinstate the plea of not guilty. The motion was granted and the case set down for trial.

---

[2] At the hearing on motion to withdraw the guilty plea, the Court addressed counsel for petitioner as follows: "Possibly, Mr. Malandra, if the court had not expressed its thoughts we would not be here on this motion today." (30a). The Court stated that, "It just means a little delay." (33a).

Ten days before the trial actually began, the Government moved for consolidation of the charges against petitioner, his father and Abrams. However on the day set for trial, on the Government's motion the charges against Abrams were severed.

Abrams appeared as a principal witness for the prosecution. On February 10, 1960, petitioner and his father were found guilty on all the charges against them. On April 20, 1960, all charges still pending against Abrams were dismissed. Abrams never went to trial at any time in any district.

Petitioner and his father were given extraordinarily harsh sentences. Openly nettled that petitioner had "animal-like" asserted his right to plead not guilty and stand trial, the District Court (Madden, J.) sentenced petitioner to ten years in prison and a fine of $30,000. Petitioner's father received a sentence of two years in prison and a fine of $30,000. The District Court further refused to permit either defendant to remain at large on bail pending a motion for new trial and, later, pending appeal to the Court of Appeals.

The Court of Appeals for the Third Circuit overruled the District Court twice on the subject of bail. On the merits, that court (Goodrich, Kalodner, Forman, JJ.) reversed the conviction of petitioner's father, holding that ". . . the most that can be said in the case against Samuel Kravitz is that there are one or two circumstances which arouse a little suspicion and might make one lift one's eyebrows." (*infra* Appendix A, p. 15a). The judgments against petitioner were affirmed.

B. Vital Occurrences During the Trial

1. The prosecutor's statement, in his final argument, that tax evasion was "in a real sense, treason"

Towards the close of his summing up, the Assistant United States Attorney said (674a-675a):

> "This crime that we are dealing with here is, in a real sense, treason. These defendants, by their action, have torn away the very foundation of our Government. Unless the Government maintains a strong, even, economic keel, it will be destroyed."

The Court of Appeals declared that the language used by the prosecutor was "deplorable," that an Assistant United States Attorney, representing the authority of the United States, must rest his case upon evidence, "not epithet." The Court of Appeals refused any relief to petitioner, however, on the ground that the accusation of treason probably had no prejudicial effect and that counsel for petitioner lay low, raised no objection and only brought the matter up months afterward as a basis for reversal. (*Infra* Appendix A, p. 10a).

In fact, the "deplorable" conduct was raised the day following its occurrence in the defendants' motions for judgment of acquittal or new trial. (8a). The District Court, far from rebuking counsel for the Government, said that he was not sure whether or not evasion of income tax constituted treason. (745a). The attitude of the United States Attorney's office is made unmistakably clear by its argument to the Court of Appeals. The prosecutor's brief declared: "[I]t is fatuous to complain of the allusion to 'treason' when the crime charged involved breach of faith with one's government." (U.S. Brief, p. 29).

2. The District Court's charge on the credibility of Joseph Abrams

A crucial issue in the trial was the whereabouts of the bonds, which were the end product of Abrams' scheme to evade income taxes. The defense theory was that Abrams had taken and kept all of them. (638a-646a). Abrams, on the other hand, had testified that more than three-quarters of them had been given to petitioner. (275a-276a). There was thus presented a direct clash of opposing testimony to be resolved by the jury.[3]

In this setting, the District Court placed the imprimatur of the Court on the Abrams' testimony. He charged the jury as follows on the credibility of Abrams (711a):

> "Let me say quite frankly to you that I do not believe Joseph Abrams absolutely and in all respects. In the Court's estimation it would be difficult for any man to get on the witness stand and be absolutely correct regarding what happened back in 1951, especially when it involved multifarious transactions surrounding these events. . . . It is easy to see how a mistake would be made. When you couple that with the admission on the part of Abrams that he still has criminal and civil tax problems to face in the future, one has some difficulty in accepting his story as gospel in all respects.

[3] The importance of the issue is magnified by the unprecedentedly severe sentence meted out by the District Judge. Petitioner received consecutive sentences for evasion of his personal income tax and the evasion of the corporate income tax. In both instances, the judge imposed the maximum sentence permissible under the statute. If the petitioner was unjustly convicted on the indictment involving his personal income, five years will be eliminated from his prison sentence.

"However, in view of all the other testimony and evidence I say quite frankly to you, members of this jury, that in the main I believe the testimony of Abrams was credible. The only recollection that the Court has of Abrams' testimony being at variance with the truth, as I see the truth in the matter, is that in his testimony, that he did not sign the name Joe Haber on the signature card, Exhibit G-54. . . . when it appears from the stipulation of the handwriting expert that he did.

"Is this sufficient to disregard his testimony altogether regarding this scheme and the various parts the defendants played in it? That is for your judgment.

"And, just as I have informed you of my reactions regarding the credibility of the testimony of Abrams, I think it proper also to point out to you my beliefs regarding the testimony entered in the record here of Herman Kravitz before the Grand Jury in New York. I do not believe that testimony in all respects and for the same reasons. Kravitz knew then that he had criminal and civil tax problems to face in the future the same as Abrams had and has.

"Let me point out to you the exhibit which is a jeopardy assessment notice against Kravin Park Clothes in the amount of $1,252,077, dated November 1, 1956. Let me further remind you that Herman Kravitz was indicted, as you can see from the indictments which you will take into the jury room with you, on March 13, 1958, and that he plead not guilty to those indictments in this court, according to the records of the court, on June 20, 1958. This was prior to the testimony of Kravitz in New York on June 24 and June 30, 1958. So that it is completely possible that Herman Kravitz had an eye to the future at that time and was putting his best foot forward."

The reference to the handwriting expert concerns one instance in which Abrams was caught in a flat lie. He testified unequivocally that he had not signed a certain document introduced by the Government. (244a, 365a-366a). The Government stipulated that *petitioner's* handwriting expert would demonstrate that this was a falsehood on Abrams' part. (610a-611a).

The District Judge charged the jury that he believed that Abrams' story was the truth in the main. He asked them whether one lie was enough to disregard Abrams' other testimony. By so doing, he wrote off from consideration the ponderous other reasons for disbelieving Abrams. He ignored and led the jury to ignore that Abrams was a convicted felon under at least three sentences. (222a-223a, 310a-313a, 318a-319a). He ignored and led the jury to ignore that Abrams was, while testifying, an inmate of a federal prison. (222a, 267a). He ignored and led the jury to ignore that Abrams had on several occasions sought the shelter of the Fifth Amendment before Congressional investigating committees. (368a). He ignored and led the jury to ignore that Abrams had testified that he had knowingly made false statements and affidavits to the Government for his personal advantage. (332a-334a). He ignored and led the jury to ignore that on the face of Abrams' own testimony he was the designer of the illicit scheme and an accomplice in its execution. (222a-369a). He ignored and led the jury to ignore that Abrams expected to obtain a *nolle prosequi* of the indictments still hanging over his head (295a, 303a-304a), and that Abrams had vital continuing motives to buy his peace from the prosecution at the expense of the two defendants who were on trial.

3. The distortion in District Court's reading of a portion of the testimony of one witness

Elsewhere in his instructions to the jury, the District Court read to them directly from the transcript (708a), a portion of the testimony of one prosecution witness. The effect was to recall to the jury *only* testimony harmful to petitioner. The Court refused to read, or even refer to the material portions of the cross-examination of the same witness where strong doubt was cast upon the accuracy of the wtiness' direct testimony, (715a).

The witness, one Laura Barko, had been an employee of Joseph Abrams during 1951. She had been instrumental in opening one of the accounts through which diverted funds had been channeled. Her direct testimony, read to the jury by the Court during his charge, was to the effect that petitioner had asked her to open this account and Abrams approved. (708a). On cross-examination it was brought out that in 1955, five years before the trial, this same witness had given a sworn statement to Internal Revenue officials wherein she described in detail the setting up of the account in question. In the course of that statement, the witness had never once mentioned the name of petitioner. (188a-194a).

This earlier statement cast considerable doubt on her trial testimony implicating petitioner. Nonetheless, the District Court read only the harmful portion of her statement.

The Court of Appeals disposed of this issue by saying that the witness had not "recanted" her original testimony under cross-examination. This overlooks the inconsistency and contradiction between the two statements and the patently belated implication of peti-

tioner. A genuine issue was thus presented for the jury to decide. The Court of Appeals also characterized the episode as a "drop in the bucket", but it was one of the few bits of evidence connecting petitioner with the receiving end of the diversion process apart from Abrams' own testimony.

4. The unread minutes of the grand jury proceedings in New York

In line with the defense view that the money siphoned out of Kravin Park by Abrams' tax evasion scheme had all been taken by Abrams, attempts were made to obtain the minutes of the grand jury proceedings wherein Abrams had been indicted in New York The defense anticipated that examination of the New York Grand Jury proceedings would show Government testimony that all of the funds had gone to Abrams.

The trial judge quashed petitioner's subpoena to produce the Grand Jury testimony. (460a-465a). Petitioner then sought to obtain the Grand Jury testimony by proceeding in New York, and in this was successful. (668a).

Not only had the Government witness Downey testified that he had given testimony before a Grand Jury in New York, and further interrogation was cut off by the Government's objection (488a-490a), but there was another, critical reason for the trial court to inspect the Grand Jury minutes: it was highly material and relevant to determine whether the testimony given before the New York Grand Jury contradicted the Government's instant contention that Herman Kravitz had received the money produced by the illegal scheme

rather than Abrams. It was petitioner's contention that the Government could not properly charge Herman Kravitz with evading his lawful income tax the same money that formed the basis of the charge against Abrams with respect to his personal return. The Government argued this could make no difference (U. S. Brief, pp. 35-36).

The District Court for the Southern District of New York ordered the minutes of the grand jury which had indicted Abrams transcribed and sent to Judge Madden in New Jersey. These minutes did not arrive until after the verdict but before the hearing on the motions for judgment of acquittal or new trial. Judge Madden acknowledged receipt of the minutes but said that he had not bothered to read them. (742a).

Although the defendant requested the trial court here to examine the Grand Jury minutes, the court refused to do so, or even to read them when he received them (742a). It is to be noted that at the outset the district court had allotted a substantially longer period of time for the trial of this case than the time actually required, or even the twenty days estimated by the prosecution (N. T. 34, 39-41). Actually, the court had allowed as trial days until March 10, 1960, although the trial was concluded by February 10. Counsel for defendants, as the record shows, by his stipulations literally saved weeks of trial.

The Court of Appeals held that the District Court's action was not error in the absence of a showing of what the minutes would help to prove.

5. The emotional conduct of the trial judge in imposing an unprecedentedly harsh sentence upon the petitioner

The sentence imposed upon petitioner is summed up in the judge's own words as follows: "If you want to know what that means that means you just got ten years in jail and a thirty thousand dollar fine." (751a). The heaviest sentence imposed by this trial judge for income tax violation in more than a decade was three years and the heaviest sentence during this period which remained unmodified was 18 months' confinement. (See Appendix to Appellant's Brief in the Court of Appeals where the results of 48 income tax evasion cases are set forth.)

The basis for this outburst against petitioner appears in the remarks of the trial court when he announced sentence. He castigated the defendant for having withdrawn a guilty plea and standing trial. He called him "animal-like" because this seeking of a trial upset a deal with the prosecutor to dismiss the charges against defendant's father, charges which the Court of Appeals found so lacking in substantiation that they ordered the father acquitted. He heaped further condemnation on petitioner for not taking the stand and absolving his father from complicity in the tax evasion scheme. The tone of the court's remarks is clear even on the cold record:

To petitioner, the court said:

> "You, sir, I can't even recognize in view of what you have done to your father as being much more—just maybe one step higher than animal-like. You pled guilty in this court, your father was out of the case, and you heard the United States Attorney make a representation to the court that if you were sentenced, he would move to

nolle pros in your father's case. Your thought so much of your own skin that you would see your father go to jail. I don't think any more words need describe you." (750a-751a).

To petitioner's father the court said:

"Mr. Kravitz, it must be a very happy day—I am addressing myself to Mr. Samuel Kravitz—it must be a very happy day for you when you are compelled, as you well know, by the actions of your own flesh and blood, to stand before a criminal court, and accept a sentence at the hands of another human being. Your son had you out of this case. He pled guilty back in July of 1958, and because he was fearful of what justice might bring to him knowing that if he stood trial, you would stand trial side by side with him, he filed with the court an affidavit of innocence, and determined to withdraw his plea of guilty that he had entered, and saw fit not only to place himself on trial but to place you on trial with him, and then after the trial proceeded, and the court denied your counsel's application for a dismissal, and your lawyer still informed you that this case was going to the jury, your son, as is his right, stood on his constitutional ground and did not see fit to take the stand, and say, 'yes, I did these things, I did these things that the Government agents have uncovered by years of toil, but I make one piece of protest, my father didn't know.'. It is very likely that the jury would have believed him. Whether it is truthful or not, you, and you alone, and the Lord knows. There was more than sufficient evidence to warrant the jury's finding. You stand now by the action of your own flesh and blood before a criminal court to accept its sentence." (749a).

If further evidence of the court's emotional bias were needed, it is plainly seen in the refusal of the

trial court to allow the defendants to remain at large on bail after the verdict. Twice the court denied bail without explanation. (720a-722a, 751a-752a). Twice the Court of Appeals had to intervene peremptorily to reverse the trial judge and grant the bail which the lower court had refused.

6. The jury was misled in another vital particular, one as to which the defendant did not become apprised of all the facts until after the argument of this case in the court below

At the very outset of his opening, the prosecutor advised the jury:

> "Now, Joseph Abrams has been severed from the prosecution herein. He is not going to trial at this time in this district." (Additional Appendix, p. 765a)

From this, a jury would conclude that Abrams could be expected to be tried on the indictments against him, either in the District of New Jersey, or in another District. As a matter of fact, a motion had been made by Abrams on August 27, 1958, to transfer to another district (304a-305a) and during the trial the Court stated that it was *still pending*. Furthermore, the same Assistant United States Attorney filed an application to consolidate the trials of *all* defendants, which was granted, but on the day trial was to commence he moved for severance of the trial of Abrams pursuant to a stipulation consented to by Abrams' counsel (Additional Appendix, pp. 766a-771a).

In the course of trial, Abrams said that the charges against him were to be "nolle prossed" (303a-304a, 311a). On the subject of nol-pros, the court below stated before the jury that a lawyer and a prosecutor

could not nol-pros a case, but that it was a matter for the court (311a-312a).

The only rational conclusion which the jury could have reached in light of the foregoing was that Abrams was going to trial at some time in some district, and that his talk about nol. pros was just that and no more.

On April 20, 1960, the indictments against Abrams were dismissed (Additional Appendix, pp. 772a-775a). But it also appears from the order of dismissal that permission to dismiss was received by the prosecutor from the Department of Justice by letter dated *November 20, 1959*, about two months before trial.

REASONS FOR GRANTING THE WRIT

The questions presented by this case are major issues dealing with the administration of criminal justice in the federal courts. In essence, they involve the requisite elements and standards of fairness to be acknowledged as the responsibility of the two representatives of the United States in a federal criminal trial, the prosecutor and the judge. The nature of the issues is more than apparent from the summary of the facts. Without elaboration on the merits of the questions themselves, it is appropriate to develop briefly and specifically how each of the questions presented affects vitally the quality of criminal proceedings in the United States and why petitioner urges this Court to grant his petition for certiorari.

1. The prosecutor's argument to the jury that petitioner had committed "in a real sense, treason"

The issue here is the permissible scope of forensic peroration on the part of representatives of the United States. Very little has ever been accomplished in the

establishment of meaningful standards setting limits on argumentation. Yet the problem has dimensions of the highest importance to the administration of criminal justice in the federal courts.

It is not enough to say, as did the Court of Appeals in this case, that the action of counsel for the Government was "deplorable." Counsel for the Government declared that petitioner had committed "in a real sense, treason." The appellate court characterized this as an epithet. But the Court of Appeals simply matched epithet with epithet. It merely said that the use of epithet was "deplorable," but no sanctions followed.

It is respectfully submitted that gentle verbal wrist-slapping will not control the flights of oratory in summation of counsel.[4] This Court is undoubtedly well aware that the problem of "deplorable" argument is an ever present and increasing one. Petitioner's case is not an isolated instance of misconduct of counsel. Nor will the problem come under control until Government counsel are aware that the outcome of the trial may be affected by the content of their argument to the jury.

The Court of Appeals declared that counsel for the defendant lay low and raised this issue belatedly in an appellate court. That court erred in suggesting that the issue was dredged up from a record months after the event. In fact, it was raised the *following day* in the motions for judgment of acquittal or new

[4] In this case, the United States Attorney argued to the Court of Appeals that it was "fatuous" for petitioner to protest against the grossly improper remarks to the jury. (U.S. Br. 29.) Nothing could more clearly demonstrate the lack of self-restraint on the part of Government counsel on this kind of impropriety.

trial (8a, 726a). Although defense counsel did not immediately rise in front of the jury and protest, anyone experienced in the ways of a trial courtroom can appreciate the urgent necessity not to emphasize and press home the improper allegation.[5] The virus had already been implanted and could not be eradicated. *People* v. *Levan*, 295 N.Y. 26, 64 N.E. 2d 341 (1945); cf. *Vaughan* v. *Magee*, 218 Fed. 630, 631, 632 (C.A. 3 1914); *Beck* v. *Wings Field, Inc.*, 122 F. 2d 114, 117 (C.A. 3 1941). The only meaningful solution is to take steps to prevent such instances of misconduct from arising. *Greenberg* v. *United States*, 280 F. 2d 472, 474 (1st Cir. 1960).

There is today a great need for thorough and forthright examination of the permissible limits of argument to the jury. It exists in virtually every American jurisdiction. See the excellent studies in Levin and Levy, *Persuading the Jury with Facts Not in the Evidence*, 105 U. Pa. L. Rev. 139 (1956); Note, *Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 Col. L. Rev. 946 (1954); Anno. 78 A.L.R. 1438 (1932). The issue is both important and timely for consideration by this Court.

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[5] The inefficacy of attempting to undo the damage is perfectly illustrated by the reaction of the trial judge to this objection. He expressed serious doubt whether cheating the Government was not treason. (745a). It is manifest that a popular concept of treason would include tax evasion. A defendant would not be helped at all by a judge cautioning them that, technically, such conduct is not treason.

2. The trial court's partial and argumentative statement to the jury concerning the credibility of Joseph Abrams

This Court has previously spoken on the subject of the propriety of a trial judge commenting upon the credibility of a witness. In 1933, the Court decided *Quercia* v. *United States*, 289 U.S. 466, where the trial court informed the jury that he believed every single word that the defendant had said, except where he agreed with the Government's testimony, had been a lie. The Court held that this constituted unfair comment on the testimony and warranted a new trial for the defendant.

Of the many elements that go into the constitutional right to trial by jury, none is so intangible as that of credibility of witnesses. The special responsibility of the jury on matters of credibility was recently brought out by the Court of Appeals for the First Circuit in the noteworthy case of *Greenberg* v. *United States*, *supra*. It is the kind of question in which demeanor plays so important a part, whether rightly or wrongly. And it is therefore, necessarily, a special province for the jury.

It follows that any judicial commentary on the subject of credibility is suspect as an improper intrusion into affairs which should be left entirely to the jury. The trial judge in *Quercia* was especially crude in his commentary, but the main prejudice to the defendant arose from his conclusion of the defendant's lack of veracity rather than his unique and unpersuasive reason for disbelief.

In this case, the trial court threw the weight of his office and the prestige of his position into the dispute over the credibility of Joseph Abrams. By declaring

that he believed Abrams and did not believe petitioner, the court did as much harm to petitioner as the judge did to Quercia when he said that he thought the defendant had lied. On a crucial issue in the case, the judge's comment on so intangible a matter raises a serious question, which is clearly worthy of review by this Court.

Aggravating the court's intrusion into the special province of the jury is the character and background of the person whom the court stated to be worthy of belief. Abrams was not an upright citizen of proven good character and unimpeachable reputation. He was rather a proven thief and liar, an unprincipled but sly felon, who seized and capitalized upon an opportunity to extricate himself as far as possible from a whole net of criminal prosecutions.

The injury to petitioner was further compounded by the grossly unfair way in which the matter of Abrams' credibility was put to the jury. There was no calm and *impartial* analysis of the host of factors in Abrams' character and background to make anything he said suspect. Only one was mentioned, the demonstrated lie on the witness stand. And the trial court said: "Is this sufficient to disregard his testimony altogether?" This charge amounts to a direction to disregard all other reasons.

It is submitted that the charge on this score was really an insidious device to persuade the jury and to show the jurors that the judge was on the side of the government. *United States* v. *Carmel*, 267 F. 2d 345, 350 (7th Cir. 1959); *Blumberg* v. *United States*, 222 F. 2d 496, 501 (5th Cir. 1955). Traditionally, such a charge should be condemned.

The action of the trial judge raises three different questions of obvious and pervading importance: *First*, when if ever is it appropriate for a trial judge to intrude into the province of the jury by expressing an opinion on the credibility of witnesses? *Second*, is it proper for a judge ever to place the imprimatur of his office on the testimony of a person of the class of Joseph Abrams? *Third*, when a trial judge does guide the jury on an issue of credibility, can he do so in such an unfair and prejudicial way as was done in this case? It is respectfully submitted that these questions are fundamental to the administration of criminal justice in the federal courts.

3. The District Court's reading of an extract from the record so as to distort the value of that evidence

The action of the trial judge in reading directly from the record a portion of the testimony of a prosecution witness, without at the same time recalling and giving mention, let alone equal emphasis, to the defense undercutting of that testimony, presents an important question on the power of the trial judge to comment on the evidence. The effect of the court's action in this case was to lend added credence to Mrs. Barko's damaging statements by repeating them at the end of a lengthy trial without also recalling to the jury that this testimony was radically different from the statement the witness had made under oath five years before when her recollection was fresh. (715a).

The exercise by a federal trial judge of his prerogative to comment on the evidence is highly dangerous unless the trial judge is scrupulously fair and impartial in the presentation of his views. One of the most sensitive aspects of the procedure is illustrated here when

the judge does not speak from his own recollection, which a jury might disregard, but reads *directly from the transcript* of the original testimony. (708a). Matters thus selected by the judge are engraved on the juror's minds just as they are about to begin their deliberations. The possibilities of injustice demand that where excerpts are read, the total context must likewise be presented. The Court of Appeals, standard that would allow a judge to quote any testimony that had not been recanted but only contradicted on the witness stand is so extravagantly unfair as to demonstrate the urgent necessity for review of the problem in this Court.

4. The refusal of the trial judge to consider evidence offered to show that the Government had mounted inconsistent prosecutions

Nothing should be more clear than that the United States cannot properly convict two defendants of a crime which only one of them could conceivably have committed. In this case certain corporate funds were diverted into the personal accounts of Abrams or petitioner. Petitioner contended that all the funds had gone to Abrams so that he, petitioner, had received no personal income.

The Government charged both petitioner and Abrams with receiving this personal income. Petitioner attempted to show by the Grand Jury minutes, first by subpoena (460a-465a), see *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1960), and then by proceedings in New York to obtain them, that Government witnesses had testified that Abrams received all the money. This effort was stymied when the trial judge refused to continue the trial for one or two days (602a, 649a-650a, 668a-670a), or even to read the minutes upon

receiving them. (742a). See *United States* v. *Hernandez*, F. 2d (C.A. 2, Docket No. 25604, Aug. 24, 1960). It would not have been too late if the District Judge had made the minutes a part of the record and read them in connection with petitioner's post-trial motions.

The issue here is the standard of conduct to be followed by representatives of the United States. In the court below, the Government took the position that, as long as convictions are obtained it could make no difference that the prosecutions rested upon inconsistent testimony of Government agents. Such a cavalier and insensible attitude destroys a principle which ought to be basic to the search for justice in the federal criminal courts.

There is presented in this case a substantial conflict between the Courts of Appeals which this Court should resolve.

5. The unprecedentedly harsh sentence in this case, openly based upon petitioner's refusal to be convicted on a plea of guilty, as upheld in the Court of Appeals is directly in conflict with the decision of the Seventh Circuit in United States v. Wiley, 278 F. 2d 500 (C.A. 7 1960).

No problem in criminal law is more vitally important today than the anarchical inequality in sentences.

> "The achievement of the purposes of the criminal law can never be satisfactorily approximated until this intractable problem is in some fashion reduced to minor, instead of major, proportions. The very ideal of justice is offended by seriously unequal penalties for substantially similar crimes, and the most immediate of its practical purposes are obstructed. Grievous inequalities in sentences are ruinous to prison discipline. And they destroy

> the prisoner's sense of having been justly dealt with, which is the first prerequisite of his personal reformation. Experience seems to show that large numbers of sentencing judges with power to fix both individualized minimum terms and individualized maximum terms will inevitably produce an indefensible heterogenity of result. How can a reasonable degree of order be brought into this chaos?" Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 439 (1958).

The Seventh Circuit, in *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7 1960), provided a partial answer to the important question put by Professor Hart. There the trial court had imposed a severe sentence upon the expressed ground that the defendant had insisted upon his constitutional right to stand trial. His confederates, including the "ring leader" with several prior convictions, pleaded guilty and received lighter sentences. The manifest disparity in the sentences underscored the unacceptable rationale of the trial judge to penalize those who seek a trial rather than plead guilty.

In this case, the trial judge did the same thing. He repeatedly castigated petitioner for not allowing sentence to be imposed on a guilty plea. This was the overriding consideration in the mind of the judge, to the extent that his thinking is reflected in his words. The unparalleled severity of the resultant sentence is revealed, not in comparison with sentences imposed on confederates (although the charges against Abrams were dismissed), but in comparison with what this judge and his fellow judges have done in similar cases.

The two cases were thus substantially identical at the trial stage. The conflict arises because the Third Circuit affirmed the sentence of petitioner while the

Seventh Circuit in the *Wiley* case vacated the sentence as too harsh and based on improper standards.

This conflict in the circuits reveals at least a partial solution to the anarchical pattern of sentencing in the federal courts. The Seventh Circuit rule opens the way to a limited appellate review of sentence where there is great disparity of punishment and the lower court patently invoked improper standards in fixing the more harsh penalty. There is again presented in these cases a conflict between the Courts of Appeals on a matter which goes to the very core of the criminal law, a matter on which there is today the opportunity for this Court to make substantial strides forward in the quality of justice in the federal courts.

6. The prosecutor's suppression of evidence in this case is directly in conflict with the decisions of this Court

On April 20, 1960, the indictments against Abrams were dismissed (Additional Appendix, pp. 772a-775a). But it also appears from the order of dismissal that permission to dismiss was received by the prosecutor from the Department of Justice by letter dated *November 20, 1959.*[6]

It is respectfully submitted that the pre-trial motions for consolidation and for severance, the statement of the prosecutor to the jury in his opening speech, and his silence when the subject of nol-pros was brought up on cross-examination, particularly in the light of the remarks of the trial judge at that time and in the charge, misled both the jury and the defendant, and

[6] It should also be noted that the orders of dismissal (Additional Appendix, pp. 775a-776a) are incorrect in the statement that Abrams was then serving a sentence for evasion of his personal and corporate income taxes. He was serving a sentence for embezzlement. (310a-311a).

amount to suppression of material evidence in the case by the prosecutor which would have a direct bearing upon the motive, and therefore the credibility, of Abrams with respect to his testimony in the case.

We again allude to the obligations of the prosecuting attorney as summarized in *Berger* v. *United States*, 295 U.S. 78 (1955), and refer to the most recent case of *Alcorta* v. *Texas*, 355 U.S. 28 (1957), basing its decision on Constitutional due process.

We submit that the prosecuting attorney was duty bound not to mislead the jury into thinking that Abrams would, or even might go to trial, and that he was duty bound to disclose the true facts of the situation so that they could be handled properly and without prejudice. Once the subject was brought out on cross-examination, he was also duty bound to state the facts. Certainly he was duty bound not to permit the appearance which was the result in the circumstances, that Abrams had nothing to gain from his testimony in this case.

CONCLUSION

The handling of this case below represents so substantial a departure from the accepted and usual course as to call for the exercise of this Court's power of supervision. This petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
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Philadelphia 7, Pa.
Counsel for the Petitioner

OCTOBER 1960.

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,180, 13,181, 13,182 and 13,183

UNITED STATES OF AMERICA

v.

SAMUEL KRAVITZ AND HERMAN KRAVITZ

Samuel Kravitz is Appellant in Nos. 13,180, 13,182 and 13,183.

Herman Kravitz is Appellant in Nos. 13,181, 13,182 and 13,183.

Appeal from the United States District Court for the District of New Jersey

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Argued July 11, 1960

Before GOODRICH, KALODNER and FORMAN, *Circuit Judges*

Opinion of the Court

(Filed August 12, 1960)

By GOODRICH, *Circuit Judge*

This is an appeal from convictions of two defendants, father and son, for income tax evasion and conspiracy. There are four indictments and each defendant was found

guilty on the three applicable to him.[1] Defendants appeal, not on the basis of the insufficiency of the evidence as to Herman Kravitz (the son) but for alleged errors in the conduct of the trial and in the jury charge. With regard to Samuel Kravitz (the father), the point is made that the evidence is insufficient to convict him. This latter point will be discussed separately.

Just enough facts will be stated to indicate the nature of the case before the trial court. The two Kravitzes were the owners of all the shares in a corporation called Kravin Park Clothes. Fifty-five percent of the stock was owned by Samuel and forty-five percent by Herman Kravitz. This company had contracts with the United States for the furnishing of uniforms at the time of the Korean War. It was charged and proved by the evidence that earnings were drained off from Kravin Park to other corporations. Some of these corporations were controlled by the conspirators and used for the purpose; in other instances, bank accounts were set up in the names of existing corpo-

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[1] Indictment No. 114-58 charged Samuel Kravitz with willfully attempting to evade personal income taxes owed by him for the year 1951 by willfully understating his net income on the return filed by him for that year in violation of § 145(b) of the Internal Revenue Code of 1939.

Indictment No. 115-58 charged Herman Kravitz with a similar offense with regard to his personal income taxes for that same year.

Indictment No. 116-58 charged Samuel Kravitz, Herman Kravitz and Joseph Abrams with unlawfully conspiring to evade income and excess profits taxes owed by Kravin Park Clothes, a corporation, for the year 1951 in violation of 18 U.S.C.A. § 371, and specified certain overt acts performed by the conspirators in furtherance of the alleged conspiracy.

Indictment No. 117-58 charged Samuel Kravitz, Herman Kravitz and Joseph Abrams with attempting to evade taxes owed by Kravin Park Clothes for the year 1951 by willfully understating the corporation's net income on the tax return filed by it for that year in violation of § 145(b) of the Internal Revenue Code of 1939.

An order of severance was entered as to Joseph Abrams on the two indictments in which he was included.

rations but in banks not used by those corporations and without the officers of those corporations knowing what was being done. In this way, obviously, the amount of profit on which Kravin Park was compelled to pay income tax was greatly reduced since, on its books and tax return, these payments were recorded as having gone out to the corporations named for subcontractor work supposed to have been done by them. So far as the evidence showed, the actual operations of this plan were carried on by Joseph Abrams[2] and Herman Kravitz. Abrams was a key witness for the prosecution and most of the summation by defense counsel consisted of an attempt to discredit his testimony. The money thus siphoned from the treasury of Kravin Park was in turn drawn out of the banks in which it was deposited. It is not necessary to go into detail concerning just how this was done nor in what the withdrawn funds were invested. Nor is it necessary to follow through the difference of opinion which developed between Abrams and Herman Kravitz as to who got what.[3]

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[2] Joseph Abrams was a former public accountant who had handled the Kravin Park account from 1944 until 1949 when he gave up his accounting practice. He considered himself to be a tax expert.

In 1951, the year in question, Abrams was in the clothes manufacturing business. At the time of trial, he was serving a prison sentence for filing false tax returns for himself and a corporation known as Fabric Garment Company for the year 1952 and for stealing certain goods from that company.

[3] In Volume XXXV of the English publication called "Law Quarterly Review" (July, 1893) there is a note at page 197 about the litigation called "The Highwayman's Case." It was a bill in equity.

> "It recites an oral partnership between the defendant and the plaintiff, who was 'skilled in dealing in several sorts of commodities;' and that the parties had 'proceeded jointly in the said dealings with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch;' and that defendant had informed plaintiff that Finchley 'was a good and convenient place to deal in, and that the said commodities

On this appeal defendants' counsel presents a great many alleged errors as a basis for reversal. It seems to us that his greatest emphasis is directed to the charge of the trial judge and to the prosecuting attorney's summation. We shall deal with these first, then take up the alleged errors occurring in the course of the trial and finally deal separately with the case against Samuel Kravitz, the father.

THE CHARGE.

Appellants' counsel makes a scattering shotgun attack at the charge of the trial judge saying that it is an argument for the prosecution rather than an objective description of the case to the jury and a presentation of issues for that body to decide. This general attack is not well founded. The trial judge gave a thorough and, quite evidently, carefully prepared charge to the jury. He told it what the offenses were with which the defendants were

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were very plenty at Finchley aforesaid,' and that if they were to deal there 'it would be almost all gain to them.' Further recitals show how the parties accordingly 'dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things to the value of £200 and upwards;' and how there was a gentleman at Blackheath who had several things of this sort to dispose of, which defendant represented 'might be had for little or no money, in case they could prevail on the said gentleman to part with the said things;' and how, 'after some small discourse with the said gentleman,' the said things were dealt for 'at a very cheap rate.' The Bill further recites that the parties' joint dealings were carried on at Bagshot, Salisbury, Hampstead, and elsewhere, to the amount of £2000 and upwards; and that the defendant would not come to a fair account with the plaintiff touching and concerning the said partnership. The Bill, which concludes with a prayer for discovery, an account, and general relief, purports to be signed at the foot by counsel, one Jonathan Collins." 35 L. Q. REV. at 197-198.

The article reports that it is further stated that John Everet, the plaintiff, was executed at Tyburn in 1730; Joseph Williams, the defendant, at Maidstone in 1727. *Id.* at 199.

charged. He read Section 145(b) of the Internal Revenue Code of 1939 and Section 371 of 18 U.S.C.A. He explained at length the difficult-to-explain crime of conspiracy and he recounted the witnesses one by one for the jury's consideration. It is not to be expected that counsel for the defense would see the charge in the same light as that of a reviewing court. There is no doubt that, on the whole, the trial judge made a fair presentation to the jury.

Now we turn to particular points complained of by counsel with regard to the charge. The judge mentioned to the jury the testimony of Abrams. The judge said he did not believe all of Abrams' testimony but thought that on the whole it was acceptable. He pointed out one instance where it was shown that Abrams had lied in his testimony. He also commented upon the evidence produced from a transcript of Grand Jury hearings in New York where Herman Kravitz had testified upon the same subject matter. The judge said he did not believe all of Herman Kravitz's testimony either and he pointed out why.[4]

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[4] The relevant portions of the charge are as follows:

"While, the weight and credit to be given to the testimony of a witness is a province of the jury, it is also proper for the court to make such observations regarding the witnesses and their credibility as the court may feel the circumstances of each particular case may require. Such observations by the court are not to impinge upon the rights of the jury or to usurp its functions in weighing the evidence but are limited solely to the duty of assisting the jury in its deliberations. I specifically reiterate that if your recollection is different than mine it is your recollection that controls, and if your observation of the witness leads you to a different conclusion than mine, you are the final judges of the weight and credibility of the evidence.

"There has been considerable comment regarding the credibility of the witness Joseph Abrams. Let me say quite frankly to you that I do not believe Joseph Abrams absolutely and in all respects. In the Court's estimation it would be difficult for any man to get on the witness stand and be absolutely correct regarding what happened back in 1951, especially when

it involves the multifarious transactions surrounding these events, hundreds of thousands of dollars, fictitious invoices, fictitious bank accounts, millions of dollars of bonds. It is easy to see how a mistake would be made. When you couple that with the admission on the part of Abrams that he still has criminal and civil tax problems to face in the future, one has some difficulty in accepting his entire story as gospel in all respects.

"However, in view of all the other testimony and evidence I say quite frankly to you, members of this jury, that in the main I believe the testimony of Abrams as credible. The only recollection that the Court has of Abrams's testimony being at variance with the truth, as I see the truth in the matter, is that in his testimony, that he did not sign the name Joe Haber on the signature card, Exhibit G-54, the account in the name of Model Clothes in the Royal Industrial Bank, when it appears from the stipulation of the handwriting expert that he did.

"Is this sufficient to disregard his testimony altogether regarding this scheme and the various parts the defendants played in it? That is for your judgment.

"And, just as I have informed you of my reactions regarding the credibility of the testimony of Abrams, I think it proper also to point out to you my beliefs regarding the testimony entered in the record here of Herman Kravitz before the Grand Jury in New York. I do not believe that testimony in all respects and for the same reasons. Kravitz knew then that he had criminal and civil tax problems to face in the future the same as Abrams had and has.

"Let me point out to you the exhibit which is a jeopardy assessment notice against Kravin Park Clothes in the amount of $1,252,077, dated November 1, 1956. Let me further remind you that Herman Kravitz was indicted, as you can see from the indictments which you will take into the jury room with you, on March 13, 1958, and that he plead not guilty to those indictments in this court, according to the records of the court, on June 20, 1958. This was prior to the testimony of Kravitz in New York on June 24 and June 30, 1958. So that it is completely possible that Herman Kravitz had an eye to the future at that time and was putting his best foot forward.

"I again remind you that it is not the Court's intention or function to usurp your duties or rights in determining what weight and credit shall be given to the witnesses and again I admonish you that if your belief in this regard is different than mine, then it is your belief that controls."

None of this goes beyond the power of a federal judge to comment upon testimony when he sees fit. There was nothing venomous about the judge's characterization of the testimony of these two men. That a federal judge in a criminal case may comment on the evidence to the jury and give his personal opinion thereon is too well established to require elaborate citation of authority.[5] The point is that he must not prejudice the case and he must leave ultimate determination of the facts to the jury.[6] In his charge the trial judge said at least five times that the determination of the facts was for the jury. He not only said it in passing but he emphasized it so no juror who was listening could have any doubt about what his responsibility was.[7] Defendants' point is not well taken.

Another complaint made by the appellants is that the judge misled the jury in quoting an excerpt from the Supreme Court opinion in *Spies* v. *United States*, 317 U. S. 492 (1943).

This objection is so thin as to be almost frivolous. The trial judge was explaining to the jury the meaning of

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[5] See *e.g.*, Quercia v. United States, 289 U.S. 466, 469 (1933); United States v. Murdock, 290 U.S. 389, 394 (1933); United States v. Curzio, 170 F. 2d 354, 357 (3d Cir. 1948); United States v. Rutkin, 189 F. 2d 431, 440 (3d Cir. 1951), *aff'd on other grounds* 343 U.S. 130 (1952).

[6] See cases cited note 5 *supra*. See also United States v. Gollin, 166 F. 2d 123, 127 (3d Cir.), *cert. denied* 333 U.S. 875 (1948); Sullivan v. United States, 178 F. 2d 723 (D.C. Cir. 1949); Billeci v. United States, 184 F. 2d 394, 402-03 (D.C. Cir. 1950); United States v. Link, 202 F. 2d 592, 594-95 (3d Cir. 1953); Blunt v. United States, 244 F. 2d 355, 365-66 (D.C. Cir. 1957); Buchanan v. United States, 244 F. 2d 916, 919-20 (6th Cir. 1957); Benes v. United States, 276 F. 2d 99, 102-04 (6th Cir. 1960).

[7] He made such a statement both immediately before and immediately after his reference to the testimony given by Abrams and the Grand Jury testimony of Herman Kravitz. See note 4 *supra*.

the term "willful attempt to evade" as used in the statute. Then he quoted this excerpt from *Spies*.

> "By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." 317 U. S. at 499.

Nobody had claimed in this case that anybody had kept a double set of books. But the reading of the line of illustrations used by the Supreme Court to show the application of the terms in the statute was proper help to give the jury and the very language used in the Supreme Court opinion showed that the various points stated were "by way of illustration."

The defense also complains that the judge quoted testimony of a witness named Laura Barko but that he did not read Mrs. Barko's cross-examination. The testimony had to do with the establishment of an account in one of the banks which was a recipient of the siphoning process. The particular question involved signature cards. Cross-examination showed that the witness had made a statement several years earlier to a federal investigating officer in which she had not mentioned Herman Kravitz. But in the court room she did mention Herman Kravitz. The jury had all this before it. The witness did not recant her original testimony upon cross-examination. The whole episode was but a drop in the bucket which by the time the drop was put in was nearly overflowing.

THE SUMMATION.

The defense complains of the language used in the next to the last paragraph of the government's summation. The prosecutor said: "This crime that we are dealing with here is, in a real sense, treason. These defendants, by their action, have torn away the very foundation of our Government. Unless the Government maintains a strong, even economic keel, it will be destroyed." It should be noted that prior to this burst of oratory the government's summation had been strictly factual. The prosecutor had described the way in which the conspiracy was alleged to have operated and recalled to the jury various bits of evidence which, according to his argument, made the case against the defendants a convincing whole. Then for three sentences the departure from the record took place. We think little of the words used by the prosecutor. We think they were unnecessary in an otherwise logical and convincing summation. But we quite realize as we have said before that some latitude must be given to lawyers' language in a hard fought case.[8] To say that this remark would have a prejudicial effect on a jury which had listened throughout a long trial to the unfolding of the testimony is to attribute a stupidity and absence of common sense which is incredible in a federal jury.[9] Even counsel for the defendants, in arguing the point orally, said that everybody knows what treason is. We, too, think that everybody does, although perhaps not with full knowledge of the words used in the Constitution.

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[8] See United States v. Stirone, 262 F. 2d 571, 577 (3d Cir. 1958), *rev'd on other grounds* 361 U.S. 212 (1960). See also United States v. Sober, et al., F. 2d , Nos. 13,037-13,041 (3d Cir. June 24, 1960); DiCarlo v. United States, 6 F. 2d 364, 368 (2d Cir. 1925).

[9] See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 237-40 (1940).

We do not, however, pass this point lightly. A United States attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the United States and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not epithet. If his case is a sound one his evidence is enough: if it is not sound, he should not resort to epithet to give it a false appearance of strength. The language just quoted is deplorable.

Furthermore, on this point, the defendants' counsel did not say a word. Had he thought the language harmful to his clients at the time, he could have objected and we have no doubt that the court would have corrected any erroneous impression that the jury might have had and that the prosecutor would have apologized for his use of the term. Alternatively he could have moved for the withdrawal of a juror. We think the defendants' lawyer is not entitled to lie low, say nothing and to bring up this fleeting argument months afterward as a basis of reversal.[10]

THE ALLEGED TRIAL ERRORS.

We turn now to complaints about the conduct of the trial.

One objection has to do with alleged improper limitation of defense counsel in his reading of certain testimony of Herman Kravitz given before the Federal Grand Jury in New York City. The transcript of Herman

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[10] *Ibid.* See also Jenkins v. United States, 251 F. 2d 51, 52 (5th Cir. 1958).

This case is not at all like those exceptional cases where justice would require us to reverse even though defense counsel voiced no objection to the prosecutor's remarks at the time. Compare Viereck v. United States, 318 U.S. 236, 248 (1943); Stewart v. United States, 247 F. 2d 42 (D.C. Cir. 1957); Ginsberg v. United States, 257 F. 2d 950, 954-55 (5th Cir. 1958); Wagner v. United States, 263 F. 2d 877, 882-84 (5th Cir. 1959).

Kravitz's testimony before the Grand Jury was released for use in this case by the judge in New York[11] and portions were read into evidence by the prosecutor. He selected, of course, those parts of the Kravitz testimony which admitted participation in the unlawful scheme. The testimony was highly damaging. The defense was permitted to read into evidence other portions of Herman Kravitz's testimony before this same Grand Jury. The question of what defense counsel would be permitted to read was discussed at length between counsel for the prosecution, counsel for the defense and the judge out of the presence of the jury. When the judge said he was not going to admit one of the things which defense counsel wanted to read the judge indicated that he would be glad to hear defense counsel on a motion to introduce the whole record. Counsel did not follow this offer up.

The portions read into evidence by the defense had to do with explanations of statements in the excerpts read into evidence by the prosecution.[12] Limiting defense counsel to such items was proper and any argument to the effect that if part of the record is introduced all should be received is not well founded in view of the defense's failure to ask for the whole business.[13] As to proper limitations upon the opponent's right to introduce the remainder of a verbal utterance, see 7 WIGMORE, EVIDENCE § 2113 (3d ed. 1940).

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[11] See FED. R. CRIM. P. 6(e).

[12] The defense was in this way able to introduce into evidence testimony which tended to show that Abrams had kept all of the diverted funds.

[13] Defense counsel's failure to request that the complete transcript be introduced into evidence was probably based on the fact that certain portions not read into evidence by either side would have been, as the trial judge so aptly put it, "terribly detrimental to the interests of the defendant."

Complaint is made of permission given to Abrams to plead the Fifth Amendment privilege against self-incrimination. Abrams, under cross-examination, was asked whether he was guilty of the charges pending against him in the District Court for the District of New Jersey. Abrams was not represented by counsel. The judge told the witness that he need not answer and he claimed his constitutional privilege. We see no error in this. Abrams had already admitted a very great many damaging acts in connection with the charge of conspiracy and it clearly appeared that he was already in jail. To ask him outright and make him say whether he was guilty of pending charges was certainly placing him in the dilemma of getting into trouble for perjury or admitting his guilt in the matters charged. There was no error; if there was, it could not possibly have been prejudicial. Indeed, the trial court told the jury it could consider Abrams' pleading of the constitutional privilege as bearing upon his credibility. If this went too far the prosecution did not complain about it.

Error is alleged in the admitting into evidence of a memorandum which Abrams said that he and Herman Kravitz had worked out together back in 1952.[14] This document put down a great many figures concerning their transactions; Abrams said it was shown to no one but was just a matter "between he and I." The admission of this document is attacked because as "past recollection recorded," the proper foundation was not laid. Abrams did not say he did not remember at the time of testifying all the material in the document. He did not say he did remember it all either. But he claimed to remember a very great deal, and was even able to state from present memory that the memorandum differed from the final ac-

[14] Although the handwriting was entirely that of Abrams, Abrams' testimony is explicit in pointing out that Herman Kravitz participated in the preparation of the document.

counting between Herman Kravitz and himself by no more than $10,000 to $20,000.

We do not need at this time to reexamine the basis of what is charged to be an artificial and too strict limitation upon the introduction of documents under the past recollection recorded rule.[15] The point to dispose of the objection here is that if Abrams' testimony was believed this was a joint document with Herman Kravitz. If so, it is admissible, of course, as an admission against Herman Kravitz even though cumulative.[16]

Finally, appellants complain that it was error for the court to refuse to continue the case and to examine the minutes of a proceeding before the Federal Grand Jury in Brooklyn, New York. The trial court emphasized to defense counsel that, while counsel was on notice two weeks before that the prosecution was going to use the New York Grand Jury testimony, he did nothing about getting the Brooklyn Grand Jury minutes until too late to get the Brooklyn court to consent to the removal during the time testimony was being given at the Camden trial.

We find no error in the trial court's refusal to continue this case while these minutes were examined. There is no showing of who the witnesses were whose testimony was supposed to be looked at or what connection they had with the trial going on in Camden. At the time counsel for the defense asked the court to examine these minutes the testimony was all in and the trial had been a long and technical one. In the absence of any showing of what the tardily procured minutes would help to prove, it certainly

---

[15] Compare 3 WIGMORE, EVIDENCE § 738 (3d ed. 1940) and MCCORMICK, EVIDENCE § 277 (1954) with In re Messenger, 32 F. Supp. 490, 495-97 (E.D. Pa. 1940). See generally on "past recollection recorded" and "present recollection revived" United States v. Riccardi, 174 F. 2d 883 (3d Cir.), *cert. denied* 337 U.S. 941 (1949).

[16] 4 WIGMORE, EVIDENCE § 1048 et seq. (3d ed. 1940).

was not error to finish up the already prolonged litigation in Camden.

The Sentence.

Counsel urges the point that, while an appellate court may not correct sentences in the federal system, when the sentence is unduly harsh it should make the court extraordinarily astute to make sure that the trial was fair.[17] We have two answers to this point in regard to this case. First, we have examined the record and the objections with great care. Second, the sentence, while severe, is not shockingly brutal. Herman Kravitz is sentenced, counting the concurrent terms, to ten years in prison and to pay a fine of $30,000. This is within the sentence allowed by the statute.[18] The case, if the testimony for the prosecution is believed, and the jury accepted it, shows a shocking well-planned scheme to cheat the government. It is not surprising that the sentence showed that the judge regarded the matter as a very serious one.

The Case Against Samuel Kravitz.

Samuel Kravitz is the father of Herman Kravitz. The whole story of the Kravitz-Abrams dealings which was in evidence was limited to Herman. Let us turn to what there is to connect Samuel Kravitz with this scheme.

Samuel Kravitz was the president and majority shareholder in the corporation Kravin Park Clothes. He, along

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[17] Counsel relies on Amendola v. United States, 17 F. 2d 529, 530 (2d Cir. 1927); United States v. Jazzichi, 75 F. 2d 497 (2d Cir. 1935); and United States v. Pagano, 224 F. 2d 682 (2d Cir. 1955), for this proposition.

[18] The maximum sentence he could have been given upon conviction on the three indictments was fifteen years in prison and a $30,000 fine. See 18 U.S.C.A. § 371 ($10,000 fine and/or five years in prison) and Int. Rev. Code of 1939, § 145(b) (same). There were two separate violations of the latter statute. See note 1 *supra*.

with the accountant who prepared the tax return, signed the corporation's income tax return for the year 1951, the year in question. We do not know of any connection with the financial end of the corporation by Samuel Kravitz. There was testimony that he knew Abrams and gave Abrams expert advice about preparing bids for government contracts; but that is all. One of the corporations to which money from Kravin Park Clothes was diverted was called J. K. Productions. Samuel Kravitz signed a corporate resolution setting up a bank account for J. K. Productions.[19]

There is one episode which does cast suspicion. An account was opened with a Mr. Wood, an officer in the Leonia Bank and Trust Company of Leonia, New Jersey. This account was in the name of "E. W. Randal" and could have been found to contain proceeds of the siphoning process already described. Wood could not remember whether Samuel Kravitz or Herman Kravitz opened this account. He remembers that in 1954 both of these men visited him one evening at his home and upon leaving one of them left upon a chair a package containing some coupons, clipped from bonds, to be deposited in the Randal account. Samuel Kravitz, in 1953, cashed two checks with a factor named Brown which were signed, made payable to and endorsed "E. W. Randal."

We think the most that can be said in the case against Samuel Kravitz is that there are one of two circumstances which arouse a little suspicion and might make one lift one's eyebrows. But we do not find, after a careful review of the case as a whole, that there is enough here to justify twelve reasonable jurors to find him guilty beyond a reasonable doubt. The case, as said before, was a complicated one and it could well be that with the best of intentions jurors were so impressed with the weighty case made out

[19] This was perfectly legitimate since, at the time, J. K. Productions was partially owned and controlled by the Kravitzes.

against Herman Kravitz that the father, Samuel, was unconsciously dragged in.

As to Herman Kravitz, the judgments of the district court are affirmed. As to Samuel Kravitz, the judgments are reversed and the mase remanded to the District Court for the District of New Jersey with directions to file judgments of acquittal.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgments Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,181

UNITED STATES OF AMERICA

v.

HERMAN KRAVITZ, *Appellant*

(115-58 Criminal)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ..... DISTRICT OF NEW JERSEY

Present: GOODRICH, KALODNER and FORMAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court in this case be, and the same is hereby affirmed.

Attest:

HARRIET G. HUMPHRYS
Chief Deputy Clerk

August 12, 1960

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,182

UNITED STATES OF AMERICA

v.

SAMUEL KRAVITZ and HERMAN KRAVITZ, *Appellants*

(116-58 Criminal)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ..... DISTRICT OF NEW JERSEY

Present: GOODRICH, KALODNER and FORMAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case as to Herman Kravitz be, and the same is hereby affirmed; and that the judgment of the said District Court in this case as to Samuel Kravitz be, and the same is hereby reversed, and that cause remanded with directions to enter judgment of acquittal.

Attest:

HARRIET G. HUMPHRYS
Chief Deputy Clerk

August 12, 1960

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,183

UNITED STATES OF AMERICA

v.

SAMUEL KRAVITZ and HERMAN KRAVITZ, *Appellants*

(117-58 Criminal)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ..... DISTRICT OF NEW JERSEY

Present: GOODRICH, KALODNER and FORMAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case as to Herman Kravitz be, and the same is hereby affirmed; and that the judgment of the said District Court in this case as to Samuel Kravitz be, and the same is hereby reversed, and that cause remanded with directions to enter judgment of acquittal.

Attest:

HARRIET G. HUMPHRYS
Chief Deputy Clerk

August 12, 1960

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,181, 13,182 and 13,183

UNITED STATES OF AMERICA

v.

SAMUEL KRAVITZ and HERMAN KRAVITZ

Samuel Kravitz is Appellant in Nos. 13,182 and 13,183.
Herman Kravitz is Appellant in Nos. 13,181, 13,182 and 13,183.

Sur Petition for Rehearing

Present: GOODRICH, KALODNER and FORMAN, *Circuit Judges.*

After due consideration the petition of Herman Kravitz for rehearing in the above-entitled cases is hereby denied.

By the Court
GOODRICH
Circuit Judge

Dated: September 30, 1960

ILE COPY

Office-Supreme Court, U.S.
FILED
DEC 27 1960
JAMES R. BROWNING, Clerk

No. 510

In the Supreme Court of the United States

OCTOBER TERM, 1960

HERMAN KRAVITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

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No. 510

HERMAN KRAVITZ, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–16a) is reported at 281 F. 2d 581.

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 1960 (Pet. 16a–17a), and a petition for rehearing was denied on September 30, 1960 (Pet. 19a). The petition for a writ of certiorari was filed on October 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecutor committed reversible error in his summation by comparing petitioner's crimes with treason, where there was no objection at the trial.

2. Whether the District Court transgressed the jury's function of passing upon the credibility of witnesses by commenting upon the credibility of one witness and by reading to the jury a portion of the direct testimony of another witness, where the jury was repeatedly instructed that it was the sole judge of credibility.

3. Whether the District Court erred in denying a continuance requested late in the trial to permit the defense to examine testimony, allegedly given before a grand jury in another district, in order to show that the Government was conducting another prosecution inconsistent with the theory of one count in the instant case.

4. Whether the sentence imposed by the District Court is so harsh as to call for vacation by an appellate court.

STATUTES INVOLVED

18 U.S.C.:

> SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined

not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

STATEMENT

In March 1958, petitioner and his father, Samuel Kravitz, were indicted, each in three counts, for the willfully attempted evasion of a large part (more than $500,000) of their 1951 individual income taxes and a large part (more than $780,000) of the 1951 taxes of Kravin Park Clothes, Inc. ("the corpora-

tion"), and for conspiring to evade the corporation's taxes. One Joseph Abrams was also named as a defendant in the two counts relating to the corporation. (R. 1a, 3a, 5a, 9a, 15a–21a.) Petitioner, having pled not guilty to all charges at his arraignment on June 20, 1958, withdrew those pleas on July 8, 1958, and entered pleas of guilty. (R. 3a, 5a, 10a, 27a.) On October 2, 1959, the District Court ordered petitioner's bail increased from $1,000 to $20,000. One week later petitioner moved for leave to withdraw his pleas of guilty. The motion was granted on October 16, 1959, pursuant to the trial judge's policy of refusing to sentence defendants protesting their innocence before imposition of sentence. (R. 3a, 5a–6a, 10a–11a, 33a.)

Petitioner and Samuel Kravitz were tried before a jury early in 1960 and found guilty on all counts. Abrams, severed from other defendants, testified as a Government witness. (R. 1a–2a, 3a–4a, 6a–7a, 12a–13a, 22a.) Samuel Kravitz was sentenced to concurrent two-year prison terms on each of the three counts and fined $30,000. (R. 749a.) Petitioner was fined $30,000 and was given a total prison sentence of ten years: a five years sentence was imposed on each of the three counts, the corporate evasion sentence to be served following the sentence on the individual evasion count, and the conspiracy sentence to be served concurrently with the sentence on the corporate evasion count. (R. 751a.)

The Court of Appeals affirmed petitioner's conviction, but reversed the conviction of Samuel Kravitz on the ground that there was not sufficient evidence

to connect him with the tax evasion scheme. (Pet. 15a–16a.)

The evidence of petitioner's guilt may be summarized as follows:

In 1951, Samuel Kravitz owned 55% of the stock of Kravin Park Clothes, Inc., and petitioner, his son, owned the other 45%. (R. 525a.) The corporation was engaged in the manufacture of clothing under Federal Government contracts. (R. 228a.) It maintained two separate checking accounts in Atlantic City, New Jersey, and one in New York City. (R. 68a, 79a, 86a.) A large number of checks drawn against these accounts were charged as sub-contractor costs on the corporate income tax return. The corporate books showing sub-contractor costs were not available to the Treasury investigating agents, petitioner having informed them that "they could not find such records." (R. 48a.)[1] The corporation's accountant, however, had prepared a worksheet (in connection with certain forms required by the Renegotiation Board) which listed the amounts—rounded off to the nearest $100—allegedly paid to sub-contractors during 1951. (R. 61a–62a; Govt. Ex. 7a.) The total appearing on the accountant's worksheet, $3,584,400 (which is almost identical to the amount of $3,584,379 charged to sub-contractors' expense on the corporation's tax return—

[1] The only books available for the agents' examination in 1955 were the corporation's general ledger, the stock certificate ledger and the stock transfer book. (R. 48a.)

Govt. Ex. 1) included the following ostensible payments (Govt. Ex. 7a):

Prisil Manufacturing Co.	$142,600
Model Clothes, Inc.	110,400
Good Grade Clothes	190,400
Joe Kipness Coats & Suits, Inc.	226,200
J. K. Productions, Inc.	44,700
Nat Rosen	234,200
Al Legnetti	10,500
Total	$959,000

The agents' investigation disclosed that practically all of the deductions taken on account of these alleged payments were false and fraudulent. Some of the names of the alleged suppliers were fictitious; one was a dormant company; some were companies actually in business, but doing no business whatsoever with the corporation during 1951; and one (Prisil Manufacturing Co.) was a sub-contractor of the corporation to the extent of $13,531, as compared with the $142,600 claimed. Without the knowledge of the ostensible subcontractors, petitioner and Abrams opened bank accounts in the names of the firms, in which they deposited the corporation's checks in payment of false invoices. (R. 95a, 100a, 111a–112a, 117a–118a, 120a–122a, 131a–133a, 134a–135a, 138a, 142a, 175a, 221a, 232a, 239a–241a, 244a, 251a, 542a; Govt. Exs. 7a, 45, 46, 50, 51, 54 and 55.) Petitioner and Abrams then withdrew the funds at will from these various bank accounts, mainly by means of certified checks payable to Gregory Harrington Co., Inc., New York bond brokers. (Govt. Ex. 172, p. 4.) The funds were then used to purchase—in fictitious names—bearer bonds issued by various municipal and state authorities. (Govt. Exs. 102 to 152, inclusive.) Abrams testified

that more than $1,000,000 worth of such bonds went to petitioner. (R. 275a.)

Petitioner admitted his part in the scheme before a Federal grand jury in 1958 (after conferring with his attorney—R. 215a), where he testified[2] that Abrams had obtained all of the corporation's Government contracts through his alleged influence with the Quartermaster Corps in New York; that in consideration of this he (petitioner) let Abrams in on the tax fraud scheme; that, as Controller, petitioner approved for payment the fake invoices presented by Abrams and signed the corporate checks; and that he mailed or delivered the checks to Abrams either at one of several New York hotels or at Abrams' office at the Quartermaster Corps. (R. 218a–220a.) Petitioner testified further before the grand jury as follows (R. 221a–222a):

> Question: Did any of these firms of the six I just mentioned actually do sub-contracting work for Kravin Park Clothes?
>
> Answer: No, sir.
>
> Question: Then the invoices were actually for nothing, is that right?
>
> Answer: That's correct.
>
> Question: But you caused them to be entered on the books of Kravin Park Clothes as actual expenses and had checks drawn to pay them?
>
> Answer: That's correct.

[2] This grand jury testimony was received in evidence (R. 205a) and was read to the jury by the prosecutor (R. 213a–222a).

Question: Then you say you delivered these checks personally to Abrams?

Answer: Either delivered them or mailed them. Most of them were delivered.

Question: And some you did mail?

Answer: Right.

Question: Do you know what Abrams did with those checks or was supposed to do with them, according to your arrangement?

Answer: He deposited them in bank accounts that he had opened to these companies and then he said that he was going to invest the proceeds in securities, and whenever I wanted the money he would give it to me, my half of it.

Question: About how much was the total amount of the invoices drawn from Kravin Park that you caused to be paid to Abrams?

Answer: Over $600,000.

Question: And all of the checks for this amount were delivered directly or indirectly by you to Abrams?

Answer: That's correct.

At the trial the defense called only one witness, an employee of a stock brokerage firm, who testified that a partnership owned by petitioner and Samuel Kravitz purchased $50,000 of West Virginia Turnpike bonds in April, 1952. (R. 608a–610a.)

ARGUMENT

1. Petitioner urges (Pet. 20–22) that his conviction should be reversed because the prosecutor, at the close of his summation, stated that the "crime that we are dealing with here is, in a real sense, treason."

(R. 29b.) No objection was made at the trial, and petitioner is in no position to complain now. *Johnson* v. *United States*, 318 U.S. 189, 200–201. As the court below pointed out (Pet. 9a–10a), the summation was a moderate and fair discussion of the evidence in the record up to this point, and to say that this remark "would have a prejudicial effect on a jury which had listened throughout a long trial to the unfolding of the testimony is to attribute a stupidity and absence of common sense which is incredible in a federal jury." (Pet. 9a.)

2. There is no substance to the contention (Pet. 23–26) that the trial judge transgressed the jury's province of passing upon the credibility of witnesses by commenting upon Abrams' credibility and by reading an extract from the testimony of Mrs. Barko. In the first place, the documentary and other circumstantial evidence of the systematic siphoning off of more than $900,000 of unreported corporate profits—without petitioner's confession and Abrams' testimony—fully established petitioner's guilt. Most of Abrams' testimony, except that dealing with the division of the proceeds of the fraud among the conspirators, was corroborated by the testimony of other witnesses or by documentary proof. Moreover, a federal trial judge has the right to comment on the evidence if, at the same time, he makes it clear that the jury remains the sole judge of the credibility of witnesses and of the weight of the evidence—which the trial judge here did no less than five times during his instructions. (R. 682a, 705a, 706a, 710a, 712a.)

Nor, despite petitioner's complaint (Pet. 14–15), did the trial court commit any impropriety in reading to the jury a portion of the direct testimony of Mrs. Barko, without any of the cross-examination. *Allis v. United States*, 155 U.S. 117, 124. As the Court of Appeals noted (Pet. 8a), the "whole episode was but a drop in the bucket which by the time the drop was put in was nearly overflowing."

3. Equally without merit is the argument (Pet. 26–27) that the trial court should have granted a continuance—late in the trial—to enable the defense to obtain certain testimony which it claimed (R. 462a, 742a) might possibly have been adduced before a federal grand jury in New York, indicating that Abrams had kept all of the proceeds of the tax fraud. Apart from the fact that, if true, such evidence would affect only the charge against petitioner for the attempted evasion of his own income tax, the trial court did not abuse its discretion in refusing to continue the trial. Petitioner made no showing as to who the desired witnesses were, what connection they had with the instant case, how they could possibly know who kept what amounts in the highly secret dealings between petitioner and Abrams, how their grand jury testimony could be admitted over the objection of hearsay, and why the defense had waited until the trial was almost over to make the request. When the New York grand jury minutes were finally received by the district judge, many days after the trial was concluded

(R. 742a), he was obviously justified in not reading them, since he regarded them as irrelevant to the case at hand. (R. 450a–465a.)

4. The ten-year prison sentence imposed in this case is not "unprecedentedly harsh", as alleged. (Pet. 27–29.) See, for example, *Lawn* v. *United States*, 355 U.S. 339, in which two defendants each received sentences of fifteen years on tax evasion charges of comparable flagrancy. Nor is the instant case in conflict on this issue with *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7). The two cases are factually distinguishable. In *Wiley*, the "defense certainly was not frivolous" (278 F. 2d at 504) and the trial court made it plain that the severity of the sentence resulted solely from the defendant's decision to stand trial rather than to plead guilty. Here, however, petitioner had confessed to the grand jury his guilt on two of the three counts, after consultation with his attorney and after he had been warned that his testimony could be used against him in any subsequent proceeding. (R. 215a, 218a–222a.) Indeed, petitioner had permitted his pleas of guilty to stand for fifteen months before moving to withdraw them (*supra*)—a circumstance which the trial judge, in imposing sentence, may have given some consideration, on the hypothesis that petitioner may have gone to trial for purposes of delay. (R. 747a–752a.)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys.

DECEMBER 1960.

U. S. GOVERNMENT PRINTING OFFICE: 1960

IN THE

Supreme Court of the United States

October Term, 1960.

No. 510.

HERMAN KRAVITZ,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 510.

HERMAN KRAVITZ,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY MEMORANDUM.

ARGUMENT.

The nature of the brief filed by the Government in opposition to the petition for a writ of certiorari makes necessary a short reply.

1. The Government properly does not seek to defend —as it cannot—the prosecutor who not only suppressed the fact that prior to the commencement of this trial the Government had agreed to the dismissal of the indictment in New Jersey against Abrams, but misled the jury to be-

lieve that Abrams would be brought to trial (Petition, pp. 19-20, 29-30). Cf. *Napue v. Illinois*, 360 U. S. 274 (1959), where the mere failure of the prosecutor to correct a misstatement as to a promise of leniency was held to warrant a reversal. It is not sufficient, therefore, for the Government to omit any reference to these facts: it should, in candor, join in asking this Court to grant this petition and to reverse the judgments of conviction.

2. The Government's attempt to distinguish *United States v. Wiley*, 278 F. 2d 500 (7th Cir. 1960), on the ground that the defense there was "not frivolous" (Gov't Brief, p. 11) is a misreading of that case and a misstatement of this case.

Contrary to the implication in the Government's brief, the defense here was not frivolous. The Government's own agent, testifying as an expert, admitted that if Abrams received all of the "proceeds of the fraud", petitioner would not owe additional personal income taxes (552a), and thus could not have been guilty of evasion. Again, in the light of this agent's further testimony (570a-571a), there was a substantial question as to whether there was any additional income tax due from the corporation.

The *Wiley* decision did not hinge upon the nature or quality of the defense, but upon the fact that the trial judge punished the defendant for electing to stand trial. That is exactly what the trial judge did here as evidenced by the fact that he accused petitioner of "animal-like" conduct in electing to stand trial rather than to plead guilty in *exchange* for his father's freedom (749a-750a).

The Government suggests that petitioner waited fifteen months before changing his plea and elected to stand trial for purposes of delay. It was the Government that is accountable for the delay, not petitioner. Petitioner reluctantly changed his plea to guilty on the advice of counsel that by his cooperation in testifying before the grand jury in New York against Abrams the charges against his father

would be dismissed and he could expect a suspended sentence (24a). Although the Government announced that it was ready to move this case for trial ten days after arraignment (32a), it did not do so. Certainly petitioner had nothing to do with this delay. It was not until the *Government's* delay of fifteen months that petitioner became apprehensive, with good reason as the facts show, and sought to change his plea. Indeed, the trial judge admitted that if he had not expressed his thoughts petitioner would not have moved to withdraw his guilty plea (30a). And, the fact is that the Government never brought Abrams to trial in New Jersey; instead, it used him as a witness *against* petitioner.

Petitioner's decision to plead not guilty obviously was not made to obtain delay, nor was it "animal-like", but was based upon the belief—since in part vindicated—that he and his father were innocent of the indictments. For this belief he may not be punished.

3. The Government concedes (Gov't Brief, p. 9) that there was no evidence, except Abrams' testimony, that petitioner received any part of "the proceeds of the fraud". Yet it was precisely this uncorroborated testimony—as to which Abrams stood most to gain, and placed squarely in issue his credibility—upon which petitioner received the maximum sentence of five years on the charge of evading his personal income tax. The Government cannot, therefore, sweep under the rug the defense that Abrams received all the proceeds of the fraud with the cavalier statement that the guilt of petitioner was "fully established". Nor can it justify the refusal of the trial court to read the testimony before the New York grand jury with the remark that it would affect "only" the charge against petitioner for the attempted evasion of his own income tax. This "only" resulted in five years *additional* penal servitude.

The issue of Abrams' credibility was one of critical importance. Notwithstanding judicial prerogative, to com-

ment on the evidence, and notwithstanding any instruction to the jury that it is the sole judge of credibility, a trial judge may not as was done in this case, artfully remove from the jury its prerogative and lead it down the road to conviction.

Moreover, it is obvious that the grand jury testimony "lying unread" is here relevant. Petitioner subpoenaed the grand jury notes, but the trial court quashed the subpoena (460a-465a). Petitioner promptly sought to procure them in New York, but had to have them transcribed. They were not disclosed to petitioner, but were sent to the trial judge in this case, who refused to extend the trial for a single day, and who "didn't bother" to read them after he received them (742a).

It is not accurate that petitioner made no explanation with respect to his request, for the trial court was kept fully informed. Nor is it accurate that the relevance of the grand jury notes was not shown (Petition, pp. 15-16, 26-27).

At any rate, the trial judge was under a duty to examine the grand jury notes to determine whether the Government had mounted inconsistent prosecutions and indeed omitted to produce evidence inconsistent with its prosecution. Cf. *Alcorta v. Texas*, 355 U. S. 28 (1957).

4. The Government does not attempt to excuse the prosecutor's charge of treason, but merely begs the question by asserting that it was not prejudicial. It is noteworthy that while the Court of Appeals, which the Government quotes (Gov't Brief, p. 9), would not "attribute a stupidity and absence of common sense" to a federal jury, it found that there was not enough evidence "to justify twelve reasonable jurors" to find petitioner's father guilty. The Government, despite its omniscience, cannot deny with any sense of authority, that this remark of the prosecutor was an influential factor.

CONCLUSION.

For the foregoing additional reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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